

# Exhibit DD

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

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MITSUBISHI TANABE PHARMA  
CORPORATION, et al.

Plaintiffs,  
v.  
AUROBINDO PHARMA USA, INC.,  
et al.,  
Defendants.

CIVIL ACTION NUMBER:  
17-5005

**ORAL OPINION DECIDING  
PLAINTIFFS' MARCH 20, 2020  
LETTER APPLICATION (DKT.  
NO. 278) SEEKING TO STRIKE  
PORTIONS OF DEFENDANTS'  
EXPERT REPORTS**

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**Thursday, May 14, 2020  
Commencing at 3:45 p.m.**

**B E F O R E:**                      **THE HONORABLE JOEL SCHNEIDER,  
UNITED STATES MAGISTRATE JUDGE**

**A P P E A R A N C E S:**

SAUL EWING ARNSTEIN & LEHR LLP  
BY: WILLIAM C. BATON, ESQUIRE  
One Riverfront Plaza, Suite 1520  
Newark, NJ 07102-5426  
For the Plaintiff

QUINN EMANUEL URQUHART & SULLIVAN, LLP  
BY: COLLEEN TRACY JAMES, ESQUIRE  
RAYMOND N. NIMROD, ESQUIRE  
CATHERINE T. MATTES, ESQUIRE  
BRIAN FORSATZ, ESQUIRE  
51 Madison Avenue  
New York, NY 10010  
For the Plaintiff

Karen Friedlander, Official Court Reporter  
friedlanderreporter@gmail.com  
(856) 756-0160

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**A P P E A R A N C E S : - C O N T I N U E D**

RAKOCZY MOLINO MAZZOCHI SIWIK  
BY: DEANNE MAZZOCHI, ESQUIRE  
6 West Hubbard Street  
Suite 500  
Chicago, Illinois 60654  
For the Defendant Lupin

CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C.  
BY: MELISSA E. FLAX, ESQUIRE  
5 Becker Farm Road  
Roseland, NJ 07068  
For the Defendant Lupin

HILL WALLACK LLP  
BY: ERIC I ABRAHAM, ESQUIRE  
21 Roszel Road  
Princeton, NJ 08540  
For the Defendant Sandoz

BRINKS GILSON & LIONE  
BY: MARK H. REMUS, ESQUIRE  
JOSHUA H. JAMES, ESQUIRE  
455 N. Cityfront Plaza Drive  
Chicago, IL 60611  
For the Defendant Sandoz

COSNER YOUNGELSON  
BY: REBECCA HAND, ESQUIRE  
MARC D. YOUNGELSON, ESQUIRE  
197 Route 18, Suite 104  
East Brunswick, NJ 08816  
For the Defendant Aurobindo

WITHERS BERGMAN LLP  
BY: STEVEN J. MOORE, ESQUIRE  
JAMES NEILON, ESQUIRE  
1700 East Putnam Avenue  
Greenwich, CT 06830  
For the Defendant Aurobindo

SAIBER LLC  
BY: KATHERINE ESCANLAR, ESQUIRE  
18 Columbia Turnpike, Suite 200  
Florham Park, NJ 07932  
For the Defendant Zydus

**1 A P P E A R A N C E S : - C O N T I N U E D**

**2** KASOWITZ BENSON TORRES LLP  
**3** BY: TREVOR WELCH, ESQUIRE  
HERSHY STERN, ESQUIRE  
1399 New York Ave NW, Suite 201  
**4** Washington, DC 20005  
For the Defendant, ZyduS

**5** FLASTER GREENBERG, PC  
**6** BY: JEFFREY A. COHEN, ESQUIRE  
Commerce Center  
**7** 1810 Chapel Avenue West  
Cherry Hill, NJ 08002  
**8** For the Defendant, Laurus Labs Ltd.

**9** STERNE, KESSLER, GOLDSTEIN & FOX  
BY: JOSEPH KIM, ESQUIRE  
**10** 1100 New York Avenue N.W.  
Washington, DC 20005  
**11** For the Defendant, Laurus Labs Ltd.

**12** WINSTON & STRAWN LLP  
BY: JOVIAL WONG, ESQUIRE  
**13** SHARON LIN, ESQUIRE  
1901 L Street N.W.  
**14** Washington, DC 20036  
For the Defendant, MSN

**15** MIDLIGE RICHTER LLC  
**16** BY: JAMES S. RICHTER, ESQUIRE  
645 Martinsville Road  
**17** Basking Ridge, NJ 07920  
For the Defendant, MSN  
**18**  
**19**  
**20**  
**21**  
**22**  
**23**  
**24**  
**25**

1 (ALL PARTIES VIA TELEPHONE, May 14, 2020, 3:42 p.m.)

2 THE COURT: Hi, counsel. Judge Schneider here. Is  
3 Karen there?

4 THE COURT REPORTER: Yes, Judge.

5 THE COURT: I'm ready to put the opinion of the Court  
6 on the record regarding plaintiffs' discovery application, to  
7 be confirmed in a written order to be entered. So bear with  
8 me, counsel, while I read the opinion. This matter is before  
9 the Court on plaintiffs' March 20, 2020 application, Docket  
10 No. 278 to strike portions of defendants' expert reports.

11 The application is directed to all defendants except  
12 Sandoz. Therefore, to the extent the Court's ruling strikes  
13 any portion of defendants' expert reports, the ruling does not  
14 apply to Sandoz.

15 The Court has received extensive briefs and held oral  
16 argument on April 14 and May 14, 2020. This oral opinion is  
17 being read into the record after the completion of oral  
18 argument on May 14, 2020. Plaintiffs' application addresses  
19 various aspects of the affirmative expert reports prepared by  
20 Doctors Eckhardt and Cockcroft that were served on February 7,  
21 2020.

22 At bottom, plaintiffs move to strike portions of the  
23 noted expert reports because plaintiffs claim the experts  
24 improperly attempted to amend defendants' invalidity  
25 contentions that were served on March 30, 2018, and the

1 amendment violates Local Patent Rule 3.7 which requires an  
2 amendment may only be made pursuant to a court order.

3 At oral argument on April 14 the parties agreed that  
4 plaintiffs' arguments are divided into three general areas;  
5 one, plaintiffs addressed defendants' Section 112 invalidity  
6 argument; two, plaintiffs addressed defendants' obviousness  
7 argument; and three, plaintiffs addressed defendants'  
8 anticipation argument.

9 Before the Court discusses the applicable law and its  
10 rulings, some general background information will be set  
11 forth. Obviously the parties know this ANDA patent litigation  
12 involves plaintiffs' '582 and '202 patents. The parties also  
13 obviously know the Local Patent Rules set forth the required  
14 timing and content of the parties' contentions.

15 On March 30, 2018, defendants filed their 113-page  
16 joint invalidity contentions. Plaintiffs responded on  
17 June 29, 2018. Sandoz's contentions were also filed on  
18 March 30, 2018, which Sandoz supplemented on September 19,  
19 2018. And on November 12, 2018, plaintiffs responded to  
20 Sandoz's supplemental contentions. Defendants' expert reports  
21 at issue were served on February 7, 2020. Plaintiffs'  
22 application seeking to strike portions of the noted expert  
23 reports, Docket No. 278, was filed on March 20, 2020. At  
24 present, the final pretrial conference in the case is  
25 scheduled on June 1, 2020, and trial is presently scheduled on

1 June 22nd, 2020. As to the applicable law, the general  
2 principles the Court has to apply should not be in dispute.  
3 Local Patent Rule 3.3 addresses the required timing and  
4 content of infringement contention. Local Patent Rule 3.4  
5 addresses the documents that must be produced with invalidity  
6 contentions. Amendments to contentions are governed by Local  
7 Patent Rule 3.7. The rule not only applies to amendments to  
8 contentions, but also disclosures for other documents required  
9 to be filed or exchanged.

10 Unlike Federal Rule of Civil Procedure 15 where  
11 amendments are freely given when justice so requires,  
12 amendments under Patent Rule 3.7 are more stringent and may  
13 only be granted upon a showing of good cause.

14 This is true in part because the philosophy behind  
15 amending claim charts is conservative and is designed to  
16 prevent the shifting sands approach for a party's contentions.

17 It is clear, therefore, that a party may not amend  
18 its contentions and produce documents and/or identify  
19 documents that must otherwise be produced and/or identified  
20 pursuant to Local Patent Rule 3.4 via an expert report.

21 It is also clear that if an expert report  
22 impermissibly attempts to amend a party's contentions, the  
23 relevant portions of the expert report must be stricken. See  
24 *Merck, Sharp & Dohme versus Sandoz*, 2014 Westlaw, 1494592 at  
25 411-12, District of New Jersey, April 16, 2014.

1 As noted in this case, a party cannot circumvent the  
2 local rules by including in expert reports what should have  
3 been included in a parties' contentions.

4 As a result, the court must endeavor to determine if  
5 defendants' expert reports are impermissibly attempting to  
6 amend defendants' contentions or if, as defendants assert,  
7 one, the contents of defendants' experts reports that  
8 plaintiff object to were, in fact, contained in defendants'  
9 contentions or if, two, defendants are not, in fact, amending  
10 their contentions but simply citing to evidence supporting  
11 their defenses.

12 The ruling on the issues in dispute the Court must  
13 take into account the purpose and requirements of contentions.  
14 The process has been addressed by this Court in many opinions  
15 and its previous discussions are applicable and incorporated  
16 herein by reference.

17 Although the Court has many opinions to choose from,  
18 for present purposes, it will primarily rely on its opinions  
19 and decisions in *Eagleview Technologies versus Xactware*  
20 *Solutions*, 2017 Westlaw, 5886004, District of New Jersey,  
21 November 29, 2017, and *Horizon Pharma AG v. Watson*  
22 *Laboratories*, 2015 Westlaw, 12850575, District of New Jersey,  
23 February 24th, 2015.

24 As noted, the Court's discussion in these two cases  
25 is incorporated and adopted herein by reference.



1           At set forth by the Court in its opinions, the local  
2 rules require parties to establish their contentions early on.  
3 The rules require full and timely disclosure that provides all  
4 parties with adequate notice and information with which to  
5 litigate their cases.

6           This is true in order that parties crystallize their  
7 theories of the case early on in the litigation and adhere to  
8 these theories once they have been disclosed.

9           As the Court noted in *Eagleview*, there should be no  
10 dispute that the local rules require parties to serve fulsome  
11 and timely contentions as early as possible in the litigation.

12           With this background, the Court will proceed to  
13 analyze plaintiffs' arguments and, as will be discussed,  
14 plaintiffs' application is granted in part and denied in part.

15           The Court will next address plaintiffs' Section 112  
16 invalidity argument.

17           Plaintiffs argue there are three different  
18 subsections of this argument; one, written description; two  
19 enablement; and three, indefiniteness. As to written  
20 description, plaintiffs agree defendants disclosed Claim 1 of  
21 the '582 Patent did not satisfy the written description  
22 requirement, but defendants' contentions were silent with  
23 respect to Claims 3 and 4. Claim 1 is no longer being  
24 asserted in plaintiffs' case in chief.

25           Defendants acknowledge they did not specifically or

1 explicitly set forth that Claims 3 and 4 were invalid because  
2 of their written description, but that this was nevertheless  
3 included in their contentions. Defendants argue since Claims  
4 3 and 4 are dependent on Claim 1, all of the arguments as to  
5 Claim 1 apply to Claims 3 and 4.

6 Defendants also argue by using the term "asserted  
7 claims" on Page 46 of their contentions and defining it as  
8 they did, that the asserted claims included Claims 3 and 4 of  
9 the '582 patent.

10 Defendants also argue they incorporated by reference  
11 Section 2(B)(2) at the top of Page 54 of their contentions,  
12 which refers to Claim 3 as well as several other relevant  
13 incorporations.

14 The Court agrees with plaintiffs that defendants did  
15 not sufficiently include in their contentions that they would  
16 assert a description invalidity defense as to Claims 3 and 4  
17 of the '582 patent. The Court, therefore, strikes these  
18 portions of the Cockcroft expert report or the Eckhardt expert  
19 report that addresses this invalidity defense.

20 First, it is apparent that this defense was not  
21 explicitly set forth as it should have been. Second,  
22 plaintiffs should not have to go through what the Court calls  
23 "hoops and loops" and inferences to identify defendants'  
24 defenses. This is what would be required if the Court adopts  
25 defendants' argument.

1           The Court agrees with plaintiffs that defendants'  
2 general definitions and boilerplate incorporation by reference  
3 statements in their 113-page invalidity contentions did not  
4 appropriately notify them of the written description defense  
5 as to Claims 3 and 4. This includes defendants' boilerplate  
6 incorporation of Sandoz's invalidity contentions. This type  
7 of general boilerplate incorporation is not in accord with the  
8 letter and spirit required in New Jersey's Local Patent Rules  
9 requiring full, complete, fulsome, and unambiguous  
10 disclosures.

11           Third, if defendants intended when they served their  
12 contentions, to assert a written description defense to Claims  
13 3 and 4, they would not have worded the heading in their  
14 contentions "Claim 1 of the '582 Patent is indefinite." See  
15 Page 46 of defendants' contentions. Instead, defendants would  
16 have and should have specifically referred to Claims 1, 3, and  
17 4.

18           Further, it is relatively easy to see how plaintiffs  
19 were misled since under the heading "Invalidity of Claims 3  
20 and 4" no Section 112 defense was specifically asserted.

21           Accordingly, the relevant portions of defendants'  
22 expert reports referring to a written description invalidity  
23 defense as to Claims 3 and 4 are stricken.

24           The Court now turns to enablement. The plaintiffs  
25 acknowledge this argument is nuanced. Plaintiffs admit

1 defendants' joint contentions stated a person of ordinary  
2 skill in the art could not make all the forms of canagliflozin  
3 hemihydrate that were claimed. However, plaintiffs argue  
4 Cockcroft's report now says a person of ordinary skill can't  
5 make any canagliflozin hemihydrate.

6 Defendant argues Cockcroft is simply providing  
7 evidence of why a person of ordinary skill can't make any  
8 hemihydrate. Defendants argue they are not changing their  
9 contentions because they are simply showing, in their words,  
10 plaintiff has not enabled the full scope. See transcript of  
11 oral argument on April 14 at Page 27, Line 5.

12 On this issue the Court rules in plaintiffs' favor.  
13 Defendants are limited to what they claim in their  
14 contentions. To the extent Cockcroft purports to testify that  
15 any of the subject product can't be made, the testimony is  
16 barred. However, Cockcroft can testify to what is in  
17 defendants' contentions, i.e. that not all of the product is  
18 enabled.

19 The Court will briefly comment on defendants'  
20 argument directed to plaintiffs' discovery responses. To the  
21 extent defendants attempt to excuse or justify their new  
22 contentions because of plaintiffs' alleged failure to produce  
23 discovery, the argument is rejected. It is simply too late in  
24 the case to raise a discovery issue now. Defendants have not  
25 been shy about raising disputes and they could have and should

1 have raised any discovery disputes earlier.

2 The third area to address is indefiniteness.

3 Plaintiffs argue nowhere in defendants' contentions do they  
4 claim the term "hemihydrate" is indefinite. Plaintiffs argue  
5 defendants knew what plaintiffs' construction of the term was  
6 and they never moved to amend their contentions.

7 Defendants argue since their contentions stated the  
8 phrase "crystallize form" was indefinite, the term applies to  
9 hemihydrate. The Court finds in plaintiffs' favor and strikes  
10 the relevant indefinite paragraph from defendants' expert  
11 reports.

12 Defendants essentially admit this defense was not  
13 disclosed in their contentions. Defendants admitted at oral  
14 argument that this indefinite argument only accrued after the  
15 *Markman* construction. See transcript, Page 36, Line 12 to 14.  
16 Therefore, the defense could not have been disclosed with  
17 defendants' contentions served on March 30, 2018, which was  
18 long before the *Markman* ruling. Defendants could have moved  
19 to amend their contentions after the *Markman* ruling. It's too  
20 late to do it now.

21 The Court now turns to the second general area in  
22 dispute, which is defendants' anticipation defense addressed  
23 in Eckhardt's report.

24 Simply stated, plaintiffs argue there is no  
25 discussion of an anticipation argument that relies on hydrate

1 references in Janssen's internal documents. Therefore,  
2 plaintiffs seek to strike these references.

3 In response, defendants argue the references in  
4 question are not prior art but instead are extrinsic evidence  
5 that concerns their contentions. Defendants argue Eckhardt is  
6 not asserting a new theory but instead he is citing to  
7 evidence to support a theory set forth in defendants'  
8 contentions.

9 Defendants argue the Local Patent Rules do not  
10 require parties to submit every piece of evidence. See  
11 transcript at Page 43, Line 6. As to this argument the Court  
12 rules in defendants' favor. In *Monsanto versus Dupont*, 878  
13 F.3d 1336, Page 1335, Fed. Circuit 2018, a case not directly  
14 on point but instructive, the Court ruled the cited references  
15 were extrinsic evidence that was offered to explain and  
16 support the proffered prior art. As noted in *Monsanto*,  
17 extrinsic evidence may be used to interpret the allegedly  
18 anticipatory reference and to shed light on what it would have  
19 meant to a person of ordinary skill in the art. See also in  
20 re *Baxter Travenol Labs*, 952 F.2d. 388, Page 390, Fed. Circuit  
21 1991, which stated that extrinsic evidence may be considered  
22 when it is used to explain but not expand the meaning of the  
23 reference.

24 Since the Court finds the cited references are  
25 extrinsic evidence rather than prior art, plaintiffs'

1 application regarding defendants' anticipation defense is  
2 denied. This oral opinion makes it clear that the cited  
3 references may not be used as classic prior art.

4           The Court now turns to the obviousness issue. This  
5 issue is divided into three subsections; one, references and  
6 combinations not disclosed; two, previously disclosed  
7 references cited for a different purpose; three, additions of  
8 the knowledge of a person of ordinary skill in the art to the  
9 combination. As to subsection 1, references and combinations  
10 not disclosed, plaintiffs' March 24, 2020 letter brief at Page  
11 6, Docket No. 290, highlights what is at issue.

12           Plaintiffs claim these are new references and  
13 combinations. Defendants argue these were all disclosed and  
14 what plaintiffs are really objecting to is Eckhardt addressing  
15 the substance of plaintiffs' validity contentions. The Court  
16 agrees with defendants, with two provisos. If we lived in a  
17 perfect world, defendants would have put their contentions in  
18 a perfect chart form; however, for present purposes, the Court  
19 finds that defendants made a sufficient disclosure to put  
20 plaintiffs on notice of the references and combinations at  
21 issue.

22           The two provisos to the Court's ruling are as  
23 follows: One, as to the Etter and Jeffrey references, they  
24 were not previously disclosed prior art, therefore, they are  
25 stricken from defendants' expert reports.

1 Further, combination No. 9, which was not previously  
2 disclosed shall be stricken.

3 The second subsection to deal with is previously  
4 disclosed prior art used for a new purpose.

5 This argument does not merit much discussion. The  
6 Court finds that under the circumstances of this case, the  
7 plaintiffs are attempting to create too fine a line. As to  
8 this case, defendants are permitted to respond to plaintiffs'  
9 contentions by referring to all cited portions of the  
10 references in defendants' expert reports already cited in  
11 defendants' invalidity contentions.

12 The third and last subsection to address is the  
13 addition of the knowledge of a POSA to a combination.  
14 Plaintiffs argue Eckhardt has added this to his combinations  
15 and this gives defendants a back door to include an infinite  
16 number of references. Again, defendants argue that it's just  
17 background and was disclosed.

18 The Court agrees with defendants, especially since  
19 plaintiffs' contentions apparently make the same references.

20 It will be made clear, however, that when the POSA  
21 refers to references, he or she is limited to references that  
22 have previously been disclosed in the case.

23 In sum, therefore, the Court's rulings can be  
24 summarized as follows, and will be set forth in an order to be  
25 entered: One, the portions of defendants' expert reports that



1 refer to the Section 112 invalidity defense as applicable to  
2 Claims 3 and 4 of the '582 patent are stricken.

3 Two, the portions of defendants' experts reports  
4 regarding an enablement defense that a person of ordinary  
5 skill in the art cannot make "any" forms of canagliflozin  
6 hemihydrate are stricken. Defendants experts may address  
7 whether a POSA can make "all" forms of this product.

8 Three, portions of defendants' expert reports  
9 asserting an indefinite defense based on the construction of  
10 hemihydrate are stricken.

11 Four, plaintiffs' request to strike "hydrate"  
12 references and Janssen's internal documents in the context of  
13 defendants' anticipation defense is denied.

14 Five, as to plaintiffs' request to strike portions of  
15 defendants' expert reports addressing the obviousness defense,  
16 one, plaintiffs' request to strike alleged new references and  
17 combinations not previously disclosed is denied, except the  
18 references to Etter and Jeffrey and combination 9 are  
19 stricken.

20 Two, plaintiffs' request to strike portions of  
21 references previously disclosed that were allegedly cited for  
22 a different purpose is denied.

23 And three, plaintiffs' request to strike the addition  
24 of a POSA to a combination is denied, except when the POSA  
25 evidence relies on references, the evidence may only rely on

1 references disclosed in defendants' contentions.

2           It will be further ordered that portions of  
3 plaintiffs' expert reports that solely rebut the stricken  
4 portions of defendants' expert reports are stricken. And  
5 last, it will be ordered that this order does not address the  
6 expert submissions of Sandoz.

7           So, counsel, that's the Court's oral opinion and  
8 ruling, to be confirmed in an order to be entered. There was  
9 one other issue I wanted to address with you, and that has to  
10 do with the timing in the case. Obviously, because of the  
11 current crisis, we face a different world than we did when the  
12 trial date was set. Whether the trial will take place in June  
13 as ordered is one hundred percent in the control of Judge  
14 Bumb.

15           But a question I had was whether some sort of  
16 application is going to be made to Judge Bumb in light of the  
17 postponement of what's been referenced as a related patent  
18 case before Judge Wolfson.

19           Can anyone speak to that?

20           MR. BATON: Your Honor, this is Bill Baton for  
21 plaintiffs. We understand Your Honor had inquired about this  
22 because of the compound case before Chief Judge Wolfson. That  
23 trial will not -- obviously did not proceed in May as it had  
24 been scheduled, and as Your Honor correctly noted, there was  
25 an order entered in that case by Chief Judge Wolfson that

1 essentially, you know, prevents Zydus, I believe, from going  
2 on the market, but they could probably, if they're on the  
3 call, could make it more clear, about four months after the  
4 close of evidence at that trial. That trial has not been  
5 rescheduled yet.

6           The parties had been discussing the COVID-19  
7 situation, the compound case and its effect on this  
8 potentially, and my understanding is there's somewhat of  
9 unanimous thought that it's unworkable under the circumstances  
10 the way the parties have been hampered on expert discovery to  
11 try the case in June in light of COVID-19, and in light of the  
12 agreement and order in the compound case, the parties have  
13 been conferring about what they could agree upon as a schedule  
14 to be proposed or to Judge Bumb about the trial in this case  
15 and the completion of discovery in time for a trial such that  
16 I understand that it would not, you know, go beyond what is  
17 contemplated in the compound case.

18           But those discussions are ongoing, as far as I  
19 understand, and we are intending to come to some kind of  
20 consensus and present that to Judge Bumb, in which we would of  
21 course include Your Honor in that submission, so you're aware  
22 of it. If you'd like us to work with you, we're happy to do  
23 that, but I don't think there's anything ripe to present to  
24 this Court at this time today. But we are working on it.  
25 That's the status update.

1           THE COURT: Well, you can copy me on the  
2 correspondence to Judge Bumb, but you ought to direct it to  
3 her because she's solely in control of the scheduling. I  
4 suppose what I'm thinking of is -- listen, the final pretrial  
5 conference is scheduled for June 1. It's doubtful if it goes  
6 off it will be in person, so it will be by phone probably, but  
7 I know how much work is involved in that. But right now the  
8 trial date is set, so it's not appropriate for me to change  
9 the date for the preparation and submission of the final  
10 pretrial order. But if it turns out that Judge Bumb moves the  
11 trial date and if the parties agree I can be flexible and we  
12 can be flexible in terms of adjusting the dates of the  
13 preparation of the final pretrial order. That's up to you.  
14 If you want to go ahead and prepare it, that's perfectly fine,  
15 I have no problem with that. But if the trial is going to be  
16 pushed off to some date, I don't know when in the future, I  
17 certainly have no burning desire to force the parties to get  
18 the order done so we can have a final pretrial conference by  
19 June 1.

20           I think you understand what I'm saying, that we can  
21 be flexible with regard to the order, as long as the trial  
22 date is moved. But until that trial date is changed, you  
23 know, we'll keep the deadlines for the final pretrial order  
24 on.

25           MR. BATON: Yes, Your Honor, thank you. This is Bill

1 Baton again. We will, you know, make a submission to Judge  
2 Bumb when the parties have something to propose, you know, and  
3 there is, as I said, you know, ongoing discussions about that,  
4 and we are cognizant of the pretrial order deadline, et  
5 cetera. And so we are, I think, endeavoring to get out in  
6 front of that obviously so that it gives the Court time to  
7 consider any potential application.

8 And we will copy you, but direct it to Judge Bumb.

9 THE COURT: Does that case, Judge Wolfson's case,  
10 necessarily have to try before this case and be decided?

11 MR. BATON: Your Honor, once again, Bill Baton. I  
12 think one of the issues and why we consider it related, first  
13 of all, it's the same ANDAs with the defendants and only one  
14 defendant in this case, likewise in the compound case before  
15 Chief Judge Wolfson, could enter the market absent a decision  
16 from a court before 2025, based on the regulatory filings.

17 So wrapping up what's going to happen in the compound  
18 case, there's always been something the plaintiffs at least --  
19 I can only speak for the plaintiffs -- believe makes sense  
20 because of the ramifications on the other defendants who  
21 otherwise aren't going to the market anyway unless there's  
22 some, you know, ruling.

23 And so in light of those, I guess complexities, it's  
24 plaintiffs' position that, you know -- well, first of all,  
25 let's put it this way, and I don't mean to backtrack, but for

1 the agreement that Zydus has made and the order that was put  
2 in place about its agreement not to launch four months after  
3 the close of evidence in the compound case trial, that does in  
4 some way affect in case, because even if there were -- and we  
5 don't have such an agreement at this time in this case, but if  
6 we were, we would obviously present that to the Court.

7 But if we do not have that agreement, I still would  
8 think -- I still think their agreement in the compound case is  
9 applicable because they're not going to be able to launch in  
10 this case unless there's a decision, and they'd still have to  
11 wait until the close of evidence in four months or a decision  
12 in the compound case.

13 So they are tied together in that regardless of  
14 whether there is agreement in this case, they've made an  
15 agreement not to launch and, you know, it's the same product  
16 essentially, just different patents.

17 So there are things we are trying to work out with  
18 the defendants, but that's sort of where it lines up and that  
19 they are connected and we need to, you know, come to a  
20 consensus about what we want to present to Judge Bumb and we  
21 will do that.

22 MR. WELCH: Your Honor, can I be heard? This is  
23 Trevor Welch on behalf Zydus. May I be heard?

24 THE COURT: Sure.

25 MR. WELCH: Okay. There's absolutely no reason why

1 these two cases can't be sequenced one before the other. They  
2 are related, they're relating to the same product, ultimately,  
3 but as plaintiffs pointed out, Zydus has the most pressing  
4 interest on getting this product to market sooner. We want to  
5 get this case done as soon as possible, and so in our view,  
6 there's no reason why delaying the other case should impact  
7 this case at all. If we can get this done soon, we'd love to  
8 do it.

9 MR. BATON: Your Honor, this is Bill Baton. I'd like  
10 to respond to that because during the course of the  
11 discussions as late as I believe yesterday, there certainly  
12 wasn't any position taken from Zydus that we -- there was an  
13 agreement or some need to try the case in June. The proposal  
14 I understood was not anywhere near June as the proposed trial  
15 date, but even in our discussions with them.

16 So to the extent he's making one point, I don't think  
17 we can just assume that the point he's making about when the  
18 trial takes place necessarily means he's arguing for a June  
19 trial. If he is, that's a departure from what we've heard  
20 recently.

21 THE COURT: I guess there's a couple of different  
22 issues. One is because of COVID-19 whether it's feasible even  
23 if Judge Bumb wants to go ahead to have a trial in June is one  
24 issue, and the second issue is whether it's appropriate for  
25 this case to be put on ice until Judge Wolfson's case is tried

1 and decided, I think are two different issues. Judge Bumb is  
2 going to address both of those issues. I do think in  
3 fairness, whenever your submissions are made to Judge Bumb,  
4 they should be coordinated, because if there's going to be an  
5 objection delaying or postponing for any material time the  
6 trial, she ought to hear both sides of the issue, and I'm sure  
7 she will hear both sides of the issues.

8           So maybe there being objection and all of you will  
9 take one position and Zydus will take a different position,  
10 but clearly Judge Bumb needs to know that, okay?

11           MR. BATON: Yes, Your Honor, thank you. And just to  
12 be clear, I mean the plaintiffs aren't suggesting that the  
13 case be put on ice and do nothing until the compound case  
14 happens. I think there's a discussion about how to complete  
15 this case in a timely manner that makes sense under the  
16 COVID-19 era to complete this case and get a trial ready.

17           And, you know, just to the earlier point I made about  
18 the compound case, regardless of what Zydus's position might  
19 be today, if we -- if the plaintiffs win the compound case,  
20 that may obviate the need to have a polymorph trial which is  
21 this case, the polymorph patent. So it may obviate the need  
22 to have that trial. And I say "may" but it's a possibility.  
23 So it's something that we put into the calculus. But we'll  
24 say enough about that for now because we're talking schedule  
25 and we're going to try to be reasonable here hopefully with



1 the parties and be respectful of Judge Bumb's concerns as  
2 well.

3 THE COURT: Does anything need to be done in this  
4 case aside from the preparation of the final pretrial order or  
5 addressing the issues that we're going to argue I think on  
6 Monday?

7 MS. MAZZOCHI: Your Honor, this is Deanne Mazzochi.  
8 Sorry, Your Honor, are you still there?

9 THE COURT: Yes.

10 MS. MAZZOCHI: Did we lose the Court?

11 THE COURT: No, I'm here. Can you hear me?

12 MS. MAZZOCHI: Yes, I can hear you. I just wasn't  
13 sure if anyone else could hear me. This is Ms. Mazzochi, Your  
14 Honor. Certainly on behalf of Lupin, the parties have not  
15 taken any expert discovery, one; we have not yet filed our  
16 reply expert reports. The parties have agreed to move those  
17 dates. And again, we're just trying to -- our thought process  
18 was try to present the Court with ideally one final schedule  
19 that could be adopted that would work for all parties. We're  
20 not quite there yet, but we've made a lot of progress over the  
21 course of the last week and we do have to get something to  
22 Judge Bumb certainly before the end of the month.

23 One of the issues, you know, because we have overseas  
24 experts, you know, trying to arrange for that, and also given  
25 the volume of documents that are usually an issue when it

1 comes to these depositions, I think all of the parties want to  
2 take the expert depositions live. So I think that there is a  
3 huge recognition that the trial date does need to be  
4 postponed, we're just trying to get approximate time period.

5 And from Lupin's perspective, because of the nature  
6 and the position of our case, there's no need for us to try  
7 this case quickly, given it's procedural posture in effect of  
8 what happens on the compound case. So I think because there  
9 are several defendants where, for procedural reasons, we  
10 are -- we do not need to rush. I think that's what, you know,  
11 leading to the differences, in terms of, you know, the  
12 plaintiffs and most of the defendants underlying assertions to  
13 Zydus. And we are trying quite diligently to see if we can  
14 work all of that out so that we're presenting this Court with  
15 one proposed deadline.

16 THE COURT: You know what would be really nice,  
17 counsel, if you settled the case so that this Court doesn't  
18 have to deal with these mind-numbing issues.

19 (Laughter)

20 THE COURT: I'll leave that in your very capable  
21 hands.

22 MS. MAZZOCHI: Thank you, Your Honor. And again,  
23 this is Ms. Mazzochi. I do want to let the Court know that  
24 obviously we will be reading the Court's decision today with  
25 great care, but I do want to let the Court know that, you

1 know, we obviously expect that plaintiffs will be held to the  
2 same standards of disclosure that the defendants are and you  
3 may see us as well in connection with any contention  
4 disclosure issues. But again, we'll try to meet and confer  
5 with the plaintiffs to see if we can work that out without  
6 having to trouble the Court.

7 THE COURT: That would be delightful.

8 MS. MAZZOCHI: We will try.

9 THE COURT: Nothing would please me more, and there's  
10 only one set of rules that applies in the case and they apply  
11 to everybody. So what's good for the goose is good for the  
12 gander.

13 I hope everyone is safe. I guess we'll talk on  
14 Monday, and if there's nothing else, we're adjourned.

15 MS. MAZZOCHI: Thank you very much.

16 MS. JAMES: Thank you, very much, Your Honor. We  
17 greatly appreciate the Court's time.

18 RESPONSE: Thank you, Your Honor.

19 (4:28 p.m.)

20 - - - - -

21 I certify that the foregoing is a correct transcript from the  
22 record of proceedings in the above-entitled matter.

23 /S/ Karen Friedlander, CRR, RMR  
24 Court Reporter/Transcriber

25 May 15, 2020  
Date

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